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STATUTORY LIABILITY FOR CAUSING DEATH.

(Continued from July number.)

In Kentucky, the distinction between the two kinds of statutes, and the true significance of the inquiry, whether the death is immediate or otherwise, are even more plainly brought out, if possible, in certain cases which evidently escaped the notice of Judge Cooley.

In Kentucky they have (or did have when the cases about to be referred to arose) two acts: one similar to Lord Campbell's Act, giving a remedy by action, not, as in Massachusetts, by indictment, but requiring, except in certain cases, the neglect causing the death, to be willful; the other providing in general terms for the survival of rights of action for injuries to the person, subject to certain exceptions not material here.

In *Louisville and Portland Canal Co.* v. *Murphy* (1872), 9 Bush. (Ky.) 522, explained in 11 Id. 384, and *Hansford Admx.* v. *Payne* (1875), 11 Id. 380, actions were brought by the personal representatives of the deceased, and were, in each case, held not maintainable under the former act, because the neglect alleged or shown was not willful; and it therefore became material to consider whether the action could be maintained under the latter act. In the former case the death resulted from drowning, and it was held that no cause of action vested in the deceased, and therefore none survived to his representatives. The death was evidently considered as immediate:

see remark of the Court, in 11 Bush. 384, to that effect. In the latter case the death was by poisoning, the defendant, a druggist, having put up poison by mistake for a harmless drug, and the Court held that, while there could be no recovery under the act in question, when the death was practically instantaneous or immediate, there could be a recovery in the case at bar, as an appreciable interval of suffering elapsed between the infliction of the injury and the death. The measure of recovery was said to be what the intestate would have been entitled to if he had obtained relief at the moment of death.

In New York and Texas it has been held, under statutes not different in any essential particular from Lord Campbell's Act, that an action is maintainable in case of instant death: *Brown* v. *Buffalo, &c., R. R. Co.* (1860), 22 N. Y. 191; *International & G. N. R. R. Co.* v. *Kindred* (1882), 57 Tex. 491. The contrary contention does not seem to have been considered worthy of much consideration by the Court.

In Connecticut, Tennessee and Iowa cases have arisen under statutes having a peculiar phraseology, and which raised an arguable question, whether an action was maintainable in case of instant death. Under each statute the action was held maintainable in such case. In Connecticut, *Murphy* v. *N. Y. & N. H. R. R. Co.* (1861), 30 Conn. 184, the statute (Rev. Stat. tit. 1. § 83) provided that—

"Actions for injuries to the person, whether the same do or do not result in death, shall survive to the executor or administrator."

The peculiarity of this statute is the introduction of the clause, "whether the same do or do not result in death." Giving these words their natural import, they add nothing to the meaning of the enactment. They must have been inserted with some purpose, however, and it seems probable that the purpose was to give a right of action to the representative in cases generally where an injury produces death, a right of action being (rightly or wrongly) conceived by the framers of the act as vesting in the injured person in all cases (whether the death is immediate or otherwise), so as to be able to survive to his representatives.

There is, therefore, no fault to find with the construction

given to the act by the Court. In the opinion in this case, however, there appears to be the original of Judge Cooley's comment on the Massachusetts case of *Kearney* v. *Boston & Worcester R. R. Co.* (1851), 9 Cush. (Mass.) 108. The Court apparently considered the Massachusetts decision to be an obstacle in the way of reaching the conclusion which they desired to reach, and remarked, at once distinguishing and disparaging it, that it turned upon the peculiar phraseology of the Massachusetts statute, and that the construction given was rather nice and technical. The peculiarity, however, is in the Connecticut, not in the Massachusetts enactment, and the construction applied in the Massachusetts case is a very plain and intelligible one.

The Tennessee statute was the one previously quoted, when we were considering the question of the measure of damages. The case of *Nashville & C. R. R. Co.* v. *Prince* (1871), 2 Heisk. (Tenn.) 580, before cited, held that it applied to cases of instant death, overruling on that point the case of *Louisville & Nashville R. R. Co.* v. *Burke* (1868), 6 Cold. 45. This statute, too, manifests an intention to give a right of action for all cases where death is caused by a wrongful act, and criticism, if any, would be directed, not towards the construction given by the court carrying out that intention, but towards the questionable assumption involved in the form of the enactment; that a right of action always vests in the injured person, and may therefore survive to his personal representatives.

In Iowa, the original enactment said that "whenever a wrongful act produces death, the perpetrator is civilly liable for the injury." In a revision of the statutes subsequently made, these words were omitted, but all causes of action were made to survive, provision was made as to the disposition of damages recovered, when a wrongful act produces death, and it was provided that the civil remedy is not merged in the public offense. It was evidently intended to retain the right of action originally given, and a construction of the revision, carrying out this intent is to be approved, however bunglingly the intention was expressed. The opinion in *Conners* v. *Burlington C. R. & N. Ry. Co.* (1888), 74 Iowa 383, followed in *Worden* v. *Humeston & S. R. Co.* (1887), 72 Iowa

201, sustaining an action in a case of instant death, goes upon the ground that the reasons for the common law rule, forbidding the maintenance of an action for causing death, were, that the civil remedy is merged in the felony, that a right of action for tort to the person, does not survive, and that, both reasons being removed by the statute, the rule should no longer be maintained.

The position of the Iowa Court on this subject is somewhat like the position of those who seek to identify a statute abolishing the common law doctrine of non-survival of actions for personal torts, with an enactment like Lord Campbell's Act, though apparently not precisely the same. If the reasoning of the Court were sound, it would perhaps afford some support to the latter position. But we cannot commend the reasoning or conclusion. The doctrines assigned as the foundation for the common law rule, do not fully account for it; and at all events, the repeal of so well settled a rule should not be considered as effected indirectly by repealing certain doctrines on which it is supposed to rest.

The decision of the New Jersey Court in a recent case (*Grosso* v. *Delaware, L. & W. R. Co.* (1888), 50 N. J. L. 317), substantially supports the latter idea. Counsel claimed that the common law rule depended solely on the notion that every homicide was a felony, which merged the civil remedy, and that, as the latter doctrine does not hold in this country at the present day, the rule itself should be discarded. The Court, doubting whether the reason alleged was the real and only reason for the rule, said that—

"The rule has become so solidified, that whatever its original reason was, and however such reason may have ceased to exist, it cannot be judicially disregarded or annulled, but, if injurious, its further modification must be sought from legislative action."

The question as to the extra-territorial operation of one of these statutes may be considered to involve the question, whether the right of action given is a new right of action or a continuance of one existing at common law.

In the leading case of *Whitford* v. *Panama R. R. Co.*, 23 N. Y. 465, decided in 1861, it was held that an action was not maintainable in New York, under the statute of that State, for

a death caused by the negligence of the defendant on the Isthmus of Panama, although the defendant was a corporation incorporated under the laws of New York. The decision is put expressly upon the ground that the statute gives a new cause of action.

"The statute," said DENIO, J., in giving his opinion, "does not profess to revive his [the deceased's] cause of action in favor of the executor or administrator. The compensation for bodily injuries remains intact, but a new grievance of a distinct nature, namely, the deprivation suffered by the wife and children, or other relatives, of their natural support and protection, arises upon his death, and is made by the statute the subject of a new cause of action," etc.

Chief Judge COMSTOCK and HOYT, J., dissented, and the opinion of the former in another case, to which we shall presently refer, is appended to the report of this case, as showing the grounds of his dissent.

A case arose in Vermont a few years subsequently, in 1865, (*Needham* v. *Grand Trunk R'y Co.*, 38 Vt. 294,) in which the catastrophe causing the death occurred in New Hampshire; but the death occurred in Vermont, and the decedent was a citizen of Vermont. In Vermont, it seems, there were two statutes: one abrogating the common law rule of non-survival of actions for personal torts; the other, a substantial reproduction of Lord Campbell's act. In New Hampshire there were enactments of neither kind. In considering the question of liability, the Court inquired first, whether, under the Vermont statutes, two actions were maintainable in case of death caused by negligence, and, secondly, if so, whether either statute had extra-territorial operation so as to sustain the action in the case before the Court. The first question was answered in the affirmative, but the second in the negative, and the action consequently failed. In the case of *Whitford* v. *Panama R. R. Co.* (1861), 23 N. Y. 465, the action was brought under a statute like Lord Campbell's Act, and it was not material to consider whether a mere survival act would have extra-territorial operation. Here, however, it became material to pass upon that question, as two descriptions of acts were before the Court. The first question considered by the Vermont Court, as to the maintenance of separate actions under each of the two statutes, was merely preliminary; and, considering the position taken

by the Court on the question of extra-territorial operation, was not strictly necessary to the disposition of the case. It was, however, carefully considered, and the same theory of Lord Campbell's Act was propounded as in the New York case, that it gives a new cause of action. In the course of the opinion, the Court makes the following plain statement of its position on this question:

"The intent of the 15th, 16th and 17th sections [substantially like Lord Campbell's Act] was to make the damage or pecuniary injury resulting from such death, to the widow and next of kin, the subject of a new cause of action and right of recovery, wholly distinct from the consequences of the wrong to the injured party and wholly distinct from his claim for damages resulting from such injury. The provisions of the last mentioned sections have introduced principles wholly unknown to the common law, or to any previous statute of this State, namely, that the value of a man's life to his wife and next of kin constitutes a part of his estate, to be administered by his personal representative, and that the whole proceeds of the recovery for such loss shall go to his widow or surviving relatives."

When the death is caused in one State and the action is brought in another, it is held, according to the preponderance of authority, that the action is maintainable, if both States have statutes substantially alike, giving a right of action. This was held in *Leonard* v. *Columbia S. N. Co.* (1881), 84 N. Y. 48, [followed in *Debevoise* v. *N. Y., L. E. & W. R. R. Co.* (1885), 98 Id. 379], among others, subsequent to *Whitford* v. *Panama R. R. Co.* (1861), 23 N. Y. 465.

[Cooley on Torts, 2d ed., *266, states this to be the rule also in Iowa: *Morris* v. *C. R. I. & P. R. R. Co.* (1885), 65 Iowa 727; the recovery is not on the Iowa statute, but that of the place of the injury: *Hyde* v. *W. St. L. & P. R. R. Co.* (1883), 61 Id. 441.

[And in Mississippi: *Chicago, St. L. & N. O. R. R. Co.* v. *Doyle* (1883), 60 Miss. 977; *Ill. C. R. R. Co.* v. *Crudup* (1885), 63 Id. 291. As to the administrator being the proper plaintiff under the foreign statute, the principle of the last citation is not followed in Missouri: *Vawter* v. *M. P. R. R. Co.* (1884), 84 Mo. 679; but the statutes were "materially different:" HENRY, C. J., *St. Joseph F. & M. I. Co.* v. *Leland* (1886), 90 Id. 177, 182.

[And in Indiana: *Burns* v. *Grand Rapids & I. R. R. Co.* (1887), 113 Ind. 169.

[And in Pennsylvania: *Knight* v. *W. Jersey R. R. Co.* (1885), 108 Pa. 250.

[And in New York: *supra*. But in *Leonard* v. *Columbia S. N. Co. supra*, the defendant was a domestic corporation, and the case was so distinguished in *Robinson* v. *Oceanic S. N. Co.* (1889), 112 N. Y. 315, which EARL, J., said, was a case where the plaintiff's intestate was a non-resident, being a citizen of Massachusetts, the defendant an English corporation, and the cause of action, which was

the negligent killing by a collision on the ocean, but within the jurisdiction of Great Britain, did not arise within the State of New York; "and, therefore, no Court within this State has jurisdiction of the action:" Id. 320, 321.

These cases do not impugn the authority of the Whitford case, in which it does not appear what the law of New Grenada was, but, on the contrary, the question mooted in them rather assumes that the action given by the statutes, is not, or may not be, considered to be a survival of a common law right of action vesting in the deceased.

In a recent case, *Debevoise* v. *N. Y., L. E. & W. R. R. Co.* (1885), 98 N. Y. 379, the action was held not maintainable where the accident occurred in another State, and it was not shown what the statute of that State was, thus affirming, in effect, the Whitford case.

In the Supreme Court of the United States, the right to recover in one State, under the statutes of another State, in which the death was caused, is maintained (*Dennick* v. *R. R. Co.* (1880), 103 U. S. 11), upon the broad ground that the action being transitory in its nature, a right thereof given by the statute of the State where the accident occurred can be enforced anywhere. In fact, the two States (New York and New Jersey), in that case, had similar statutes. The action was brought in New York under the New Jersey act.

The question as to the right of action under the statute for a death occurring at sea, has arisen in a number of cases, and, in a case decided in 1879 (*McDonald* v. *Mallory*, 77 N. Y. 546), while the views expressed in the Whitford case were fully approved, it was held that the action could be maintained, where the vessel on which the death occurred hailed from and was registered in a New York port; on the theory that such a vessel was to be regarded as carrying the law of New York with it. Similarly, *The E. B. Ware, Jr.*, U. S. C. Ct., Dist. La,, 1883, 16 Fed. Repr. 255, and 17 Id. 456. To the contrary, *Armstrong* v. *Beadle*, U. S. C. Ct., Dist. Cal., 1879, 5 Sawyer, 484, SAWYER, J., saying:

"The statute undoubtedly creates a new right of action, and does not merely give a remedy for a right already existing."

[After an exhaustive review of the subject, the United States Supreme Court in *The Harrisburg* (1886), 119 U. S. 199, 213,

found the case did not present this point, Chief Justice WAITE saying—

"Since, however, it is now established, that, in the courts of the United States, no action at law can be maintained for such a wrong, in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty, from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. The rights of persons in this particular, under the maritime law of this country, are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule.

"This brings us to the second branch of the question, which is, whether, with the statutes of Massachusetts and Pennsylvania, above referred to, in force at the time of the collision, a suit *in rem* could be maintained against the offending vessel, if brought in time. About this we express no opinion, as we are entirely satisfied that this suit was begun too late."

The question whether a settlement of the claim for damages, made by the injured person in his lifetime, will bar a suit under the statute after his death, arose in this country as early as 1857 (prior to the Whitford case), in the case of *Dibble* v. *New York & Erie R. R.* (25 Barb. 183), in the Supreme Court of New York. The Court, while admitting the force of the argument upon the other side, "especially when we consider the nature of the injury which the action was designed to compensate," held that the settlement was a bar, considering the cause of action in the two cases to be the same, although the measure of damages was different. Said JOHNSON, J., who delivered the opinion—

"The right of action which he [the decedent] might have enforced, had he survived the injury, upon his death accrues to his personal representatives for the benefit of those entitled to share in his estate. And it is given for the same wrongful act or neglect. This is the essential foundation of the action in either case. The wrong to be redressed is the same in both cases, but the injury flowing from the wrong to be compensated is different. The person injured is compensated for the injury to his person, the others for the injury they sustain from the death of the injured person. If the person injured obtains satisfaction by action, or by voluntary settlement and payment, before death ensues, the wrongful act which caused the injury and all its consequences, past and future, are included, and the whole canceled together, and the liability of the person inflicting the injury ended. If not, the liability continues after, and notwithstanding the death, for the purpose of compensating the widow and next of kin, for the injury resulting to them from the death caused by the wrongful act. This gives but one action for the same injury to the same person. * * * * The object of the statute, as I understand it, was to

continue the cause of action which the person injured had, and which he had not enforced but might have enforced, if death had not ensued, for the benefit of the widow and next of kin, to enable them to obtain their damages resulting from the same primary cause and not to create an entirely new and additional right of action. The plaintiff's construction would give two actions for a single wrongful act and frequently a double compensation for the injury flowing from it, to the same individuals."

This case was appealed to the Court of Appeals and that Court was equally divided in opinion regarding it, although it was three times argued before it. No disposition seems to have been made of the case in the Court of Appeals (see *Littlewood* v. *Mayor of New York* (1882), 89 N. Y. 24, 29, per RAPALLO, J., and *Schlichting* v. *Wintgen* (1881), 25 Hun. 626, 629, per DYKMAN, J.), but the opinion of Chief Judge COMSTOCK therein for affirmance, is printed as part of the case of *Whitford* v. *Panama R. R. Co.*, before referred to (23 N. Y. 484), and maintains the view that the statute is "remedial, not creative," and merely changes the common law rule by which an action for injury to the person does not survive and does not create a new cause of action. In case of instantaneous death, he says the theory is that there is a moment preceding death in which the cause of action vests in the injured person. In 1881 the same question substantially arose again in the Supreme Court of New York, (*Schlichting* v. *Wintgen*, just cited), the only difference between this case and the Dibble case being that in this an action had been brought and a recovery had therein by the injured person in his lifetime, whereas in the Dibble case, as in the English case of *Read* v. *Great Eastern R'y Co.* (1868), L. R. 3 Q. B. 555 (before cited, page 387), the settlement appears to have been made out of court. It is always assumed that there is no ground for making any difference between the case of recovery by suit and settlement without suit, and probably there is no tenable ground of distinction. The Court, in consideration of the fact that the Court of Appeals had been equally divided in the Dibble case, felt free to follow their own views, and, adopting the theory of the statute maintained in *Whitford* v. *Panama R. R. Co.*, held that the prior recovery was no bar to the action. More recently, however, in *Littlewood* v. *Mayor of New York* (89 N. Y. 24), decided in 1882, the contrary has been held by the Court of

Appeals and this vexed question is thereby settled, for New York at least, in accordance with what we have seen to be the English law upon the point. In coming to this conclusion, however, the Court of Appeals repudiates the theory that the right of action given by the statute is a mere continuation in his representatives of the right of action which the deceased had in his lifetime, and admits that it is a new right of action, taking the position that, irrespective of that question, it was not intended that there should be a recovery by the representative after the deceased had himself recovered damages in his lifetime. The opinion reviews the English cases subsequent to *Read* v. *Great Eastern R'y*, considered herein, and finds nothing in them inconsistent with that case.

In Kentucky, where, as we have seen, there are two statutes, one providing generally for the survival of rights of action for injury to the person, and the other similar to Lord Campbell's Act, but limiting the remedy in a certain class of cases to instances of *willful* negligence, it is held that the pendency of a suit brought by the administratrix under the former statute to recover damages for the suffering of the intestate prior to his death, is a bar to a subsequent action under the latter statute: *Conner's Adm'x* v. *Paul* (1876), 12 Bush. (Ky.) 144. This holding had been foreshadowed in the case of *Hansford's Adm'x* v. *Payne* (previously cited), decided the year before, in which it was objected to allowing a recovery under the survival statute, where the plaintiff failed to make out a case under the other statute, that such a ruling would enable parties to sue and recover under both statutes; but the Court replied that that result would not follow, but that a recovery under either statute would bar a subsequent action under the other. Said the Court in the Conner case:

"The acts causing the death of the party, from either the willful or ordinary negligence of the party charged, constitute but one cause of action, whether the measure of recovery sought is for the suffering of the intestate during his life, or for the willful negligence causing his death. Different degrees of negligence cannot be established from the same acts of the party charged, so as to create different causes of action in favor of the party injured, or the injuries resulting from such negligence so severed as to create distinct causes of action by the same person. The statute has only enlarged the remedy and given to parties a cause of action unknown to the common law. The party entitled to bring the action, either

at common law or under the statute, must make his election; and while the right of recovery under our statute for willful negligence may increase the measure of recovery, such an action is a bar to a cause of action that survived at common law upon the same facts. The acts constituting the wrong being inseparable, a recovery by the administrator for the mental and bodily suffering of the intestate is a bar to any proceeding under the statute, either by the personal representative or the next of kin."

The opinion in a recent Illinois case enforces the view that the right of action given by the statute, giving damages for the benefit of the relatives, is a continuance of the common law right of action belonging to the decedent, and that two recoveries cannot be had: *Holton* v. *Daly, Adm'x* (1883), 106 Ill. 131.

"The cause of action is plainly the wrongful act, neglect or default causing death, and not merely the death itself. Damages are recoverable, not for the killing, but, as was observed by COMSTOCK, J., in *Dibble* v. *N. Y. & Erie R. R. Co.*, as quoted by him in his dissent in *Whitford* v. *Panama R. R. Co.*, 23 N. Y. 486, 'notwithstanding, or in spite of, the death which ensues. The statute recognizes but one cause of suit and that is the wrong done irrespective of its consequences.' * * * A right of action which at common law would have terminated at the death, is continued for the benefit of the wife, husband, etc., and its scope enlarged to embrace the injury resulting from the death. * * * * It is not to be presumed it was intended that there should be two causes of action in distinct and different rights by the same party plaintiff for the same wrongful act, neglect or default." (per SCHOLFIELD, J., pp. 137, 140).

The question arising for decision in this case, was as to the right of the administratrix of the plaintiff in an action for personal injuries, to be substituted as plaintiff, after the death of her intestate, pending the action, from the effect of the injuries which were the subject of the action, and to maintain the action for the damages suffered by the intestate, the original plaintiff, up to the time of his death. With the effect and apparently the intention of preventing a double recovery, the Court held that a recovery could not be had by the administratrix (she having been substituted as plaintiff), upon the basis referred to, notwithstanding the fact that there was, in addition to an act like Lord Campbell's Act, a statute making actions for injury to the person survive. The Court reached this result by holding that the statute last named should be confined in its operations, although unqualified in its terms, to cases where the former act did not apply; that is, to cases where the death resulted not from the injury complained of, but from

some other cause. The lower Court had overruled a motion to dismiss, made after the substitution of the administratrix as plaintiff. This ruling, the Supreme Court held, could not be impugned, as it did not then appear of record what the cause of plaintiff's death was; but, it being shown by the evidence on the trial, that the cause of the death was in fact the injuries complained of, the Supreme Court held that the administratrix was in the same position which she would have occupied had she begun the suit originally under the act giving damages for causing death; and that, therefore, instructions allowing the jury to give a verdict upon the basis of the damages sustained by the intestate up to the time of his death, were, although excluding the death itself as an element of damages, erroneous. This case well illustrates the violence which is done to the language of enactments, and the inconsistencies in which the courts become involved in the effort to limit the plaintiff's remedy to a single action. With two laws on the statute-book, either of which might be supposed to supply any deficiencies of the other, one providing as plainly and unqualifiedly as language can, that rights of action for injury to the person shall survive, it would be thought that a recovery could be had, after the death of an injured person, of the same damages which he could have recovered in his lifetime. Yet, in an action originally begun by the injured person in his lifetime, such recovery is denied; and the administratrix is remitted, as her sole remedy, to another suit, in which the rule of damages will exclude the damages suffered by the intestate himself. In one breath, the Court asserts that the act merely continues the common law right of action which the deceased had, and in the next actually reverses the judgment below because the action begun by the decedent in his lifetime was allowed to be revived and continued *as* begun, after his death.

In Kansas, as in Illinois, it has been held that the survival act does not apply to cases where the death results from the wrongful act complained of: *McCarthy* v. *R. R. Co.* (1877), 18 Kan. 46, but recently Judge BREWER, sitting as United States Circuit Judge for Kansas, has doubted the correctness of the decision of the Kansas Supreme Court: *Hulbert* v. *Topeka* (1888), 34 Fed. Repr. 510, although he himself was a mem-

ber of the latter Court, when the decision was made, and concurred in the judgment. He now declares himself in favor of the opposite view, although bound to yield to the authority of the decision of the State Court. Referring to the two sections of the Code, § 420, providing for the survival of actions for personal injuries, and § 422, for the recovery of damages for causing death, he says:

"The measure of damages and the basis of recovery under the two sections are entirely distinct. Section 422 gives a new right of action—one not existing before; an action which is not founded on survivorship; an action which takes no account of the wrong done to the decedent, but one which gives to the widow, or next of kin, damages which have been sustained by reason of the wrongful taking away of the life of the deceased."

In accord with the opinion of Judge BREWER, and opposed to the holding of the Illinois and Kansas Supreme Courts, is a recent decision in Mississippi: *Vicksburg & M. R. Co.* v. *Phillips* (1887), 64 Miss. 693, in which, under a similar condition of the statute law as exists in Illinois and Kansas, an administratrix, not being one of the relatives entitled to recover damages for a death, was held entitled to sue under the survival act, in a case where the decedent had died from the injury complained of, CAMPBELL, J., said:

"Section 1510 provides for an action to recover for the death of a person, and it is entirely distinct from and independent of an action by the personal representative. They may co-exist but have no connection. * * * It is manifest that the death of Jo Brantley [the intestate], did not destroy the right of action; for had he commenced an action, it would have survived."

The qualification impliedly annexed to the survival act, by the decisions of the Illinois and Kansas Courts, recalls the decisions of the Maine Court: (*State* v. *Maine Central R. R. Co.* (1872), 60 Me. 490; *State* v. *Grand Trunk R'y Co.* (1873), 61 Id. 114), restricting the operation of the other act (the one giving damages for causing death), by supposing it to refer only to cases of instantaneous death; that is, where there would be no room for the operation of the survival act. The Maine decisions accomplish the result aimed at, viz., preventing a double recovery, even more effectually than those of Illinois and Kansas, as they not only render two actions after death impossible, but limit the opportunity for any action after death

for the benefit of the relatives, to cases where there was no opportunity for an action before death.

A Massachusetts decision (*Comm.* v. *Metropolitan R. R. Co.* (1871), 107 Mass. 236), also stands opposed to the Maine decisions. The Massachusetts case seems to have been rightly decided; the others appear to take an unwarrantable liberty with the text of the law.

The position that an action is maintainable under each statute separately, was maintained with great force of reasoning in the Vermont case of *Needham* v. *Grand Trunk R'y Co.* (1865), 38 Vt. 294, where the question was considered incidentally. Among other things, it was pointed out in the opinion in that case that one result of holding an action under the act, modeled after Lord Campbell's Act, to bar an action under the survival act, would be to deprive creditors of a decedent, who survived an injury for some time, and finally, perhaps after being impoverished by a long sickness, died from the effects of it, of a fund which would otherwise be applicable to the payment of their claims; as the damages recovered under the former act would go to the widow and next of kin, free from the claims of creditors. This objection is a grave one and is very suggestive. The difficulty lies in the fact that the fund recoverable under one act (supposing that there are two acts, as we have seen to be the case in not a few States), has not the same destination as that recoverable under the other, the one belonging to the family free from the claims of creditors (this is almost invariably provided in acts like Lord Campbell's Act), and the other belonging to the estate generally, and being therefore subject to the claims of creditors in the first instance. If only one action or one settlement is allowable, then the executor, or administrator (in case he alone is authorized to sue), has the power to prefer one class to another; and, if others than the executor or administrator are authorized to sue (as is sometimes done), mere priority of action on the part of the representatives of the one class, will operate to deprive the other class of a just claim. In the Kentucky case of *Conner's Adm'x*, v. *Paul* (1876), 12 Bush. (Ky,) 144, for example, the course taken by the administratrix in suing under the survival act for damages for the suffering, etc.,

of deceased, prior to the time of his death, might have resulted, and perhaps did result, under the decision of the Court, in depriving the relatives of the compensation to which, under the statute, they were entitled, and which, it would seem, they could not justly be deprived of by any arbitrary act of the administratrix; and, on the other hand, if the administratrix had sued under the other act, the creditors (supposing the estate to be insolvent), would have been deprived of assets to which they were justly entitled. The Court, in the Needham case, said, with good reason, that

"The principle, that a wrong resulting in death, affords, under these statutes, two distinct causes of suit, obviates many difficulties that would arise under a different rule."

It should be mentioned that in Massachusetts the Supreme Court, in holding the act of 1881, giving a remedy by civil action against carriers and towns for negligently causing loss of life, to be prospective only, and not to apply to past cases, said that the act gave a new remedy, additional to the remedy by indictment: *Kelley* v. *Boston & Maine R.R. Co.* (1883), 135 Mass. 448.

The Court had previously, and before the passage of the act of 1881, avoided expressing an opinion as to what effect a recovery by the party injured, or his representatives, would have upon the prosecution of an indictment under their statute: *Comm.* v. *Metropolitan R.R.Co.* (1878), 107 Mass. 236, 237, per COLT, J.

In Pennsylvania there is a statute which expressly makes the right of action conditional upon no action having been brought by the injured person in his lifetime: Act 15 April, 1851, § 19, P. L. 674.

It has been held in *Barley* v. *Chicago & A. R.R. Co.* (1865), U. S. C. Ct., N. Dist. Ill., 4 Biss. 430, that a recovery by a father for the loss of the services of his minor son, by reason of an injury to the latter which resulted in his death, was no bar to an action by the father, as administrator, to recover, under the statute, for the son's death. This holding is correct, under any theory of the statute, as the father's claim for loss of services of the son is entirely independent of and co-exists with the son's personal claim for damages, and two distinct

actions are maintainable in the son's lifetime. In Iowa, however, a curious condition of the statute law produced a curious result. In addition to a general act, imposing liability for wrongfully causing death, there was an act providing that the father, or mother, might sue for loss of services resulting from an injury to, or the *death* of, a minor child; and, in that state of the law, it was held that a father, suing as administrator under the former act, to recover for causing the death of his minor son, could only recover for the value of his son's life *after* majority, as the latter act covered the time previous to his majority: *Walters* v. *Chicago, R. I. & P. R. Co.* (1873), 36 Iowa 458.

To summarize the decisions upon the question of the right to maintain two actions for an injury causing death (exclusive of a husband's, or father's, action for loss of service by reason of injury to wife, or child), the cases stand thus: A recovery by an injured person in his lifetime will bar an action by his representatives after his death, according to the decisions in England and New York, where alone the question has arisen. The maintenance of separate actions after the death, for the benefit of the estate, and of the family respectively, under the two species of statutes, viz., the survival act and Lord Campbell's Act, is avoided in certain States, viz., Maine, Illinois and Kansas, by so construing the two statutes that they can not both apply to the same case, a restrictive construction being given to what takes the place of Lord Campbell's Act in Maine, and a restrictive construction being given to the survival act in Illinois and Kansas. The same result is reached in Kentucky, by holding an action under either of the two statutes to preclude the maintenance of an action under the other. The restrictive construction of the one statute, adopted in Maine, is, however, rejected in Massachusetts; and the restrictive construction of the other statute, adopted in Illinois and Kansas, is rejected in Mississippi and condemned upon principle by the United States Circuit Judge for Kansas. The Vermont Court stands committed to the view that separate actions are maintainable under each of the two statutes.

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(To be continued.)